IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 13TH NOVEMBER 2007 / 22ND KARTHIKA 1929

AS.No. 395 of 1996()

OS.231/1993 of II ADDL.SUB COURT,KOZHIKODE
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APPELLANTS/DEFENDANTS:
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1. GIRIJA, D/O.VADAKUMPARAMBIL MADHAVAN,
ROOM.NO.2, BLOCK NO.12, G.R.S. QUARTERS.P.O.,
MAVOOR.

2. SUNDRAN, S/O.OORANGAD PARAMBIL AYYAPPAN,
ROOM NO.2, BLOCK NO.12, G.R.S.QUARTERS, MAVOOR.

BY ADV. SRI.T.A.RAMADASAN,SUNNY MATHEW

RESPONDENTS:

T.A.M.POOKOYA THENGAL,
THEVARUMPARAMBATHU HOUSE,
P.O.PERUVAYAL.

BY ADV. SRI.SURESH KUMAR KODOTH

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 13/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP.NO.2554/96 IN A.S.NO.395/1996

Dismissed

Sd/- P.R.RAMAN, JUDGE.

13/11/2007 Sd/- V.K.MOHANAN, JUDGE.

TRUE COPY

P.S. TO JUDGE.

P.R. RAMAN & V. K. MOHANAN, JJ.

A.S. NO. 395 OF 1996

DATED THIS, THE 13TH DAY OF NOVEMBER, 2007.

J U D G M E N T

Raman, J.

Defendants are the appellants. The respondent, as the plaintiff, has instituted the suit O.S. 231/1993 before the Sub Court, Kozhikode for specific performance of the contract Ext.A1 dated 4.12.1992 executed by the defendant.

2. Ext.A1 agreement was executed by the first defendant on her own behalf as well as on behalf of her three minor children. There were five items of properties described in the schedule to the agreement. The total extent of the property is 70 3/4 cents in R.S. No. 24/2B of Peruvayal amsom, Desom. There was a settlement deed executed by the second defendant in favour of the first defendant and their three minor children as per which item No.1 of the schedule measuring about 6 1/2 cents was held by the first defendant. 10 1/2 cents each is held by the children through the mother, the first defendant. Item No.2 of the schedule is 32 3/4 cents held by the second defendant as per a separate document - No. 1782/72 of Chathamangalam Sub Registry Office. The consideration fixed in Ext.A1 is Rs. 5,250/- per

cent and an amount of Rs. 50,000/- was paid by way of advance. The balance consideration as per Ext.A1 had to be paid by the plaintiff by 30.1.1993 by which time, the defendants had agreed to get clearance of the sale as respect item Nos. 3 to 5 belonging to the minors, after obtaining sanction from court. It was alleged that the defendants took such steps for getting clearance only on 20.1.1993 and when demanded by the plaintiff after arranging necessary finance for completing the transaction, the defendants informed the plaintiff that for securing clearance of Items 3 to 5 they have applied to the District Court and the formalities in that regard are yet to be completed and hence requested for some more time for executing the sale deed and for payment of balance sale consideration. But even after waiting for one month, nothing was done in the matter and hence notice was issued through lawyer and the suit was instituted. Reply notice was sent by the defendants raising untenable contentions. It is the contention of the plaintiff that since eventually the District Court did not grant permission as such regarding Items 3 to 5, he is entitled for specific performance of contract in respect of other items which absolutely belonged to Defendants 1 and 2, after receiving the balance consideration, as fixed in the agreement.

3. The defendants, in their written statement, denied the averments made in the plaint. They even denied the sale consideration as fixed at Rs.

5,250/- per cent. According to them, subsequent to the execution of Ext.A1 agreement, there was a mutual agreement between the parties by which the they agreed that the agreement could be cancelled, which was reflected in the subsequent conduct of both the parties., that though the plaintiff agreed to pay the balance sale consideration by 30th January, 1993, the same was not done, that specific cancellation of the agreement was not done, as according to them, it was unnecessary since both sides had mutually agreed to cancel the agreement and not to be acted upon thereunder, that for getting permission from court, nothing was done by the plaintiff, that the plaintiff approached the defendants for purchase of five items of property and the sale consideration agreed upon was Rs. 10,250/- per cent, that the plaintiff insisted that only Rs. 5,250/- per cent need be shown in the sale agreement as otherwise he would have tax problems, that though the defendants agreed to this, later they doubted the consequence that may emanate from such move to not to show the full sale consideration and hence they insisted for showing the full amount which however, refused by the plaintiff, that it was at that stage that the plaintiff and defendants talked over the matter and agreed to cancel the agreement and that it was more than one month thereafter, that the lawyer notice was issued. According to them, the suit is not maintainable. Subsequently, the plaint was amended

as regarding the balance consideration to be paid.

4. The court below framed two issues ie. (i) whether the plaintiff is entitled to get a decree for specific performance of contract and (ii) reliefs and costs. The evidence in the case consists of Exts.A1 to A6 and the oral testimony of PWs 1 to 3 on the side of the plaintiff. On the side of the defendants, DW.1 was examined. But no documentary evidence was adduced.

5. The court below, after an analysis of the evidence on record - both oral and documentary, held that the defendants were not willing to perform their part of the contract and they did not take any steps for fulfillment of the contract. On the other than, the plaintiff had done all that he could pursuant to the contract. Two items of property which were owned by the defendants were scheduled in the plaint. Though there were five items in total, properties owned by the minors were excluded from the plaint schedule though it form part of the agreement no permission was granted by the court. Since all the five items were found to be separate and independent, that part of the contract by which the defendant had agreed to sell the property belonging to them were specifically directed to be enforced. The decision in **Kartar Singh v. Harjinder Singh** (AIR 1990 SC 855) was also relied on wherein it is held that even if one person is not

willing to alienate the property along with the other share holders a specific performance can be granted in respect of the person who is ready to alienate the property. Reference was also made to the decision of this Court in **Krishnan Chellappan v. Kutty Kunjamma** (1988 (2) KLT 512) . It was found that in the facts and circumstances, the plaintiff is entitled to a decree. Accordingly, the defendants were directed to execute the sale deed in respect of the plaint schedule property in favour of the plaintiff, after receiving the balance sale consideration failing which, the plaintiff was given liberty to move for execution of the sale deed through court. It is against the said judgment and decree that the present appeal is preferred.

6. Learned counsel appearing for the appellants /defendants contended that though the sale consideration shown in the agreement was Rs. 5,250/- per cent, the actual consideration agreed to be paid was Rs. 10,250/- per cent. Since the plaintiff insisted not to show the full sale consideration a lesser amount was shown and when later, the defendant insisted to show the full sale consideration, a dispute arose between the parties and based on the mediation talks it was agreed between the parties that the agreement Ext.A1 will remain as cancelled and as such the defendants did not think it necessary to terminate the agreement by giving any notice in writing. In support of the claim of such an oral agreement

between the parties, the defendants sought to produce before this Court a Fixed Deposit receipt issued by the Mavoor Service Co-operative Bank produced as Annexure A1 along with I.A. No. 4274/2007. The prayer is made to receive the said document to file and according to the appellants, the same is essential for a fair disposal of the case. After hearing both sides, we find that the document produced as Annexure I before this Court along with I.A. 4274/2007 will in no way advance the case of the appellant. Annexure I Fixed Deposit receipt issued by the Mavoor Service Co-operative Bank is dated 14.9.1996 for depositing an amount of Rs. 50,000/- (fifty thousand) for a period of twelve months, the maturity date being 14.9.1997. The judgment and decree were rendered in June, 1995. If the contention of the appellants is true, the appellants would have returned the amount of Rs. 50,000/- to the plaintiff since according to the appellant, it was agreed not to act upon Ext.A1 agreement. If the parties were to be in the same position as though there was no such agreement, for maintaining the status quo ante necessarily an amount of Rs. 50,000/- would have been returned. At any rate, Annexure A1 deposit itself shows that the deposit was made only much later after the judgment and decree and that too, the deposit is for a period of one year. That means the appellants have only ensured some income from out of the deposit so made. Therefore, even

accepting Annexure I in evidence, this will never advance the case of the appellants to show that there was any oral agreement as alleged by them to cancel Ext. A1 agreement.

7. It was then contended that the second appellant is not a literate person and though he happened to be the petitioner in the Original Petition filed before the District Court actually, he was made to file the said petition at the instance of the plaintiff. As per the agreement when the minors' property was sold by the appellants, in the capacity as their guardian, necessarily the obligation to get necessary permission is on the appellants unless it is otherwise agreed upon. Further, it is only in the petition filed by the guardian that the court can grant such permission after consideration as to whether such sale of the minors' property will be advantageous to the interest of the minor or not. The fact that such a petition was filed by the appellants itself is an indication that the appellants have taken steps in furtherance of Ext.A1. So however, timely action could not be taken and permission obtained. True, when permission was not granted by the court, rightly, the plaintiff cannot insist to seek remedy as against the properties of the minors. In such circumstances, the plaintiff's right to seek specific performance of the agreement as respect the properties of the appellants are concerned cannot be said to be in any way affected by the non grant of

permission by the District Court as regards the minor's property. It should be noticed in this connection that all the five items of properties are separate and different. It is not a joint property held by the appellants along with the minors. Therefore, whatever be the reason for non execution of the sale deed in respect of the minors' property, is not a good ground to say that the property belonged to the appellants could not be sold as agreed upon under Ext.A1.

8. Nextly, it was contended that the property of the minors were on the rear side of the property belonging to the appellants and the appellants' property has got a road frontage and therefore, it will fetch more value than the minors' property. As a matter of fact, the learned counsel for the respondent/plaintiff submitted that the respondent agreed to buy the properties of the minors also even at this stage since they have already attained majority by now, but they are not ready and willing to part with their property. Therefore, this contention has also no basis. Though it was contended that the sale consideration was a higher amount than fixed in the agreement, no acceptable evidence is adduced by the appellants in this regard. The consideration fixed in the agreement is Rs. 5,250/- per cent. Therefore, sale consideration for the total extent of the plaint schedule property has to be valued at such rate and deducting the amount of Rs.

50,000/- therefrom, the balance consideration has to be deposited by the respondent/plaintiff.

9. It is then contended that there is a delay of one month for issuing the notice after the expiry of the period prescribed for performance of the contract. We find that there is no merit in this contention. The respondent/ plaintiff has necessarily to wait till the last day to see whether the appellants/defendants are performing their part of the contract. In this connection, the specific contention of the respondent/plaintiff is that the appellants/defendants were seeking time since the application seeking permission for sale of the property of the minors was pending before the District Court and even after waiting for a month so as to enable them to comply with their obligation, when it was found that they could not perform their part of the contract, necessarily, respondent approached the court for necessary relief. If as a matter of fact, the agreement was agreed to be cancelled as contended by the appellants, there would have certainly been some convincing evidence on record to show any such settlement between the parties. No acceptable evidence is adduced in this case regarding same. As already noticed above, the immediate conduct on the part of the appellants, if as a matter of fact, there was an agreement to treat agreement Ext.A1 as cancelled would be to return the advance amount which has never

taken place. On the other hand, the appellants, after the decree, have deposited the amount in a Co-operative Bank for getting a fair interest therefrom.

10. It was then contended that the market value has shot up and at any rate, considering the overall circumstances, the court below ought not have granted the discretionary remedy under the Act. It is true that specific performance of the contract is a discretionary relief. But there must be cogent reasons to deny the same. But no ground is shown as to why such discretionary relief cannot be granted in favour of the plaintiff. The court below having found that the plaintiff is entitled to a decree for specific performance which discretion having been exercised properly, we do not find any ground to interfere with the same.

In the result, the appeal fails; it is dismissed.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

V.K. MOHANAN & P.R. RAMAN, JJ.
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A.S. NO. 395/1996
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13TH NOVEMBER, 2007.